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In The

Supreme Court of the United States

October Term, 1973

No. 73-1269

C. JAMES LOMBARDI, JR.,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

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TABLE OF CONTENTS

	Page
Statement	1
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	4
The Factual Background	4
Petitioner is Without Funds	4

Argument:

Point I The petitioner was deprived of the Sixth Amendment right of confrontation and cross-examination so far as the key witness, Kristen Diaz Stein Campbell was concerned. Her testimony was read to the jury from a trial which concerned two crimes not involved in the instant case, namely rape and kidnapping. It was, therefore, impossible to read the cross-examination of this witness since the cross-examination was not relevant for the most part to the charges of assault, which were the sole

Contents

		Page
	predicates for the instant case. This violated the Fifth, Sixth and Fourteenth Amendments.	7
Point II	The petitioner, when arrested, was told that he was being investigated for the murders of a Professor Gallagher and a Mr. Krebs. This was a total falsehood and was used as a ruse to extract a confession, in the absence of counsel, concerning kidnapping, rape and assault.	8
Point III	We adopt the dissenting opinion of the Appellate Division, First Department, *People v. Lombardi*, 39 App. Div. 2d 700, 332 N.Y.S. 2d 749, which we ask this Court to review as another grounds for granting the petition.	9
Point IV	The Trial Court told the jurors, over exception, that there was a presumption of guilt, not innocence, [illegible] it said that the jury could acquit only if an element of the crime was *missing* beyond a reasonable doubt (T2373; T2384-2385; A1222-1224). .	10
Order of Affirmance		10
Order Extending Time to File Petition for Writ of Certiorari		11

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Brookhart v. Janis, 384 U.S. 1, 3 8

People v. Lombardi, 20 N.Y.2d 266, 39 App. Div. 2d 700, 332 N.Y.S. 2d 749 . . . . . 4, 9

Smith v. Illinois, 390 U.S. 129,131, 132 8

Statutes Cited:

28 U.S.C. Section 1257(3) 2

New York Penal Law:

Section 242(1) 1

Section 242(2) 1

United States Constitution Cited:

Fourth Amendment 3, 4

Fifth Amendment 2, 3, 4, 7, 8

Sixth Amendment 2, 3, 4, 6, 7, 8

Fourteenth Amendment 2, 3, 4, 7, 8

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THE PEOPLE OF THE STATE OF NEW YORK,

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STATEMENT

Petitioner, a person without funds, respectfully prays that this Court will issue a Writ of Certiorari to review the judgment of the New York Court of Appeals rendered the 11th day of October, 1973, affirming the order of the Appellate Division of the Supreme Court of the State of New York, First Department, which in turn had affirmed the judgment of the Supreme Court, New York County, convicting petitioner of two counts of assault second degree (former New York Penal Law Section 242(1)) and one count of attempted assault second degree (former New York Penal Law Section 242(2)), after trial before Baer, J., and a jury.

The petitioner was sentenced to *consecutive* terms of 2 to 5 years on each of the assault counts and 1 to 2 years on the attempted assault charge.

Honorable Thurgood Marshall, an Associate Justice of this Court extended petitioner's time to file a Petition for Certiorari to and including February 15, 1974.

OPINION BELOW

The Court of Appeals affirmed the judgment of conviction without opinion. The opinion of the Appellate Division is at 39 App. Div. 2d 700, 332 N.Y.S. 2d 749.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). Justice Thurgood Marshall of this Court granted an extension of time to file a Petition for Certiorari until the 15th of February, 1974, a copy of which is annexed hereto.

QUESTIONS PRESENTED

1. Whether petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution were violated by the Trial Court's ruling that petitioner could not cross-examine, nor have produced in Court, one of the main witnesses against him, Kristen Diaz Stein Campbell, whose testimony was read from the first trial despite the fact that she was available and physically capable of coming to Court? No cross-examination could be read since the charges in the first trial included different crimes than those in the instant case.

2. Whether the Trial Court's ruling that the testimony of one of the main witnesses against the petitioner, Kristen Diaz Stein Campbell, could be read into evidence from a former trial which concerned charges of kidnapping and rape as well as assault, deprived petitioner of due process of law and confrontation, in view of the fact that the Trial Judge declined to permit any state-appointed psychiatrist to examine the witness who was functioning as a college professor and also declined any right of confrontation?

3. Whether the testimony of one of the main witnesses against petitioner, Kristen Diaz Stein Campbell, which was read into evidence, over objection from a prior trial which contained many charges not involved in the case at bar, violated petitioner's rights of confrontation and fair trial, in view of the fact that reading the cross-examination from the former trial geared to defending against some different charges, would have been highly prejudicial and therefore was foregone.

4. Whether petitioner's rights were violated by the admission of illegally seized evidence and a coerced confession at trial (Fourth, Fifth, Sixth, and Fourteenth Amendments)?

5. Whether the Trial Court's charge to the petit jury that there was a presumption of guilt rather than a presumption of innocence, violated petitioner's rights to a fair trial under the Fourteenth and Fifth Amendments?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth, Fifth, Sixth and Fourteenth Amendments, United States Constitution; Section 242(1), (2), Penal Law.

THE FACTUAL BACKGROUND

This case had been tried previously on an indictment accusing the defendant not only of assault, as is the situation in the case at bar, but, in addition, with the crimes of kidnapping and rape.

The Court of Appeals of New York reversed the conviction and threw out the kidnapping charges altogether, and the Trial Court itself had previously dismissed the rape charge. (See *People v. Lombardi*, 20 N.Y.2d 266). Opinion of the Appellate Division is reported at 39 App. Div. 2d 700, 332 N.Y.S. 2d 749.

Petitioner is Without Funds.

The petitioner operated a pharmacy in midtown Manhattan and also had a travel agency in the same premises.

The indictment alleged that he had, in essence, lured three young ladies into his employ in the travel agency, with a view toward having sexual relations with them, to facilitate which he allegedly surreptitiously administered a barbiturate to them.

We have previously submitted a copy of the brief in the Court of Appeals in connection with the application

for bail in this case and we ask that that brief be incorporated by reference herein.

The petitioner herein was assigned counsel in the Court of Appeals since he is without funds and counsel in this case as well, is representing him without funds.

It should be noted further that this Court has not ruled upon an application to permit Lombardi to petition in forma pauperis.

One of the main errors in the case involves the fact that perhaps the most virulent and articulate witness against the defendant-petitioner was a woman by the name of Kristen Diaz Stein Campbell, who claimed that she had been employed by Lombardi in his travel business and then was hoodwinked into going to Queens, New York, supposedly to attend a social function in connection with that business. She had testified at the original trial in elaborate detail concerning kidnapping, rape and assault. She was extremely descriptive in her testimony and there can be no doubt but that what she said had a tremendous impact on the jurors. At the time that the instant matter went to trial, however, this woman was functioning as an Associate Professor at St. John's University in New York, teaching English literature full time (T69-70; A44-45).*

The prosecution stated to the Court that he proposed to read Kristen Diaz Stein Campbell's testimony from the

* Numerals in parentheses bearing the prefix "T" refers to the trial transcript, and those numerals bearing the prefix "A" refer to the Appendix in the Court below.

first trial into evidence (hereinafter sometimes called "Stein").

A vehement objection was interposed on the grounds that this would deprive Lombardi of due process of law and of his right to confrontation of witnesses under the Sixth Amendment.

This witness was neither dead nor ill and was available, so it is inconceivable that the Court below should have refused to permit her to testify in person.

The defense counsel requested the right to have her examined by a physician to be appointed by the Court, but the Trial Judge refused this as well. The only hearing that was held involved the testimony of Mr. Campbell, her husband, and her own psychiatrist, Dr. Robertiello, who indicated that his entire medical record consisted of a 3 x 5 index card on which was inscribed the words "masochistic personality disorder."

Both Mr. Campbell and the Doctor admitted that Miss Stein was functioning very well, was very articulate, and conducted her business in a normal way. They merely stated that she became upset, without giving any significant details whatsoever, when she was confronted with the possibility of having to testify again.

It is submitted that the Court was very inconsistent because the Trial Judge told defense counsel that she could be subpoenaed as a defense witness, but that he would hold that she was unavailable for testimony as a prosecution witness. The Court, however, indicated that it would refuse to enforce any subpoena for her presence. No read-in of cross-examination was possible since the first trial included more serious crimes.

In addition, it should be noted that the Court refused to permit Lombardi to have a suppression hearing concerning the seizure of certain evidence at the time of his arrest, outside the presence of the jury.

We again ask this Court to note that we are incorporating by reference the brief submitted to this Court from the Court below at the time of the application for bail and ask that it be deemed part of this petition as if fully set forth, since the petitioner is without funds.

We also ask this Court to note that we are advancing all the Points set forth in the brief in the New York Court of Appeals as if fully set forth herein as well.

ARGUMENT

POINT I

The petitioner was deprived of the Sixth Amendment right of confrontation and cross-examination so far as the key witness, Kristen Diaz Stein Campbell was concerned. Her testimony was read to the jury from a trial which concerned two crimes not involved in the instant case, namely rape and kidnapping. It was, therefore, impossible to read the cross-examination of this witness since the cross-examination was not relevant for the most part to the charges of assault, which were the sole predicates for the instant case. This violated the Fifth, Sixth and Fourteenth Amendments.

We have set forth already that we are incorporating the brief in the Court of Appeals herein as if fully set forth and advance all the issues set forth therein.

Th Trial Court refused to appoint an independent physician to determine the availability of Kristen Diaz Stein Campbell as a witness, and relief exclusively upon the testimony of her own husband and her own psychiatrist, both of whom nevertheless admitted that she was functioning very well and was then actively teaching full time as an Associate Professor of English at St. John's University in New York. The psychiatrist had no medical records of treatment.

This woman was the most effective witness against Lombardi and there can be no doubt that it was impossible to cross-examine her from the record of the first trial because that trial included the charges of kidnapping and rape, which the case at bar had previously eliminated.

This, of course, deprived petitioner of his rights, under the Fourteenth, Fifth and Sixth Amendments, as to due process of law and confrontation of witnesses. (*Smith v. Illinois*, 390 U.S. 129, 131, 132, and *Brookhart v. Janis*, 384 U.S. 1, 3).

POINT II

The petitioner, when arrested, was told that he was being investigated for the murders of a Professor Gallagher and a Mr. Krebs. This was a total falsehood and was used as a ruse to extract a confession, in the absence of counsel, concerning kidnapping, rape and assault.

When arrested, Lombardi was told that the police wanted to ask him questions about the murders of Professor Gallagher and a Mr. Krebs. He was not told why he had been taken into custody and, as it turned out, the

investigation concerning Gallagher and Krebs had nothing to do with Lombardi, but was merely used as a ruse to hoodwink him into giving incriminating statements concerning kidnapping, rape and assault. He was without counsel at the time.

There were numerous other errors set forth in his brief in the New York Court of Appeals, which we ask this Court to review, since we ask this Court that they deem that brief to have been set forth *in toto* in the instant petition. Petitioner is without funds and cannot afford to reproduce them.

POINT III

We adopt the dissenting opinion of the Appellate Division, First Department, *People v. Lombardi*, 39 App. Div. 2d 700, 332 N.Y.S. 2d 749, which we ask this Court to review as another grounds for granting the petition.

Because of a lack of funds, we ask this Court to consider the dissenting opinion of the Appellate Division, First Department, in *People v. Lombardi*, 39 App. Div. 2d 700, 332 N.Y.S. 2d 749, as Point III of this petition.

POINT IV

The Trial Court told the jurors, over exception, that there was a presumption of guilt, not innocence, when it said that the jury could acquit only if an element of the crime was *missing* beyond a reasonable doubt (T2373; T2384-2385; A1222-1224).

Respectfully submitted,

IRVING ANOLIK
Attorney Assigned to Petitioner
C. James Lombardi, Jr.

ORDER OF AFFIRMANCE

COURT OF APPEALS
STATE OF NEW YORK No. 505

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

C. JAMES LOMBARDI, JR.,

Appellant.

Order Affirmed.

No opinion.

All concur.

DATED: October 11, 1973.

s/
Clerk, Court of Appeals

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. A-636/73

C. JAMES LOMBARDI, JR.,

Petitioner

v.

NEW YORK

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 15, 1974.

s/ Thurgood Marshall
Associate Justice of the
Supreme Court of the United States

Dated this Third
day of January, 1974.

SUPREME COURT, U. S.
FILED
MAR 13 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1269

C. JAMES LOMBARDI, JR.,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
The Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statement of the Case	3
The Crimes and the First Trial	3
The Initial Appeals from Judgment	4
The Instant Retrial	5
The Appeals After the Retrial	10
Other Appeals	11
The Instant Petition	11
Argument	
Point I—Petitioner was not deprived of his right to confront Kristin Diaz when the testimony of this witness at petitioner's first trial was read to the jury at his retrial, because she was too ill to testify	12
Point II—Petitioner's confession was not coerced by a few police questions about an unrelated crime	17
Point III—No substantial federal issue is presented by petitioner's claim of error in the judge's charge to the jury	20
Conclusion	22

TABLE OF AUTHORITIES

PAGE

Cases:

Barber v. Page, 390 U.S. 719 (1968) 14

California v. Green, 399 U.S. 149 (1970) 14
Commonwealth v. Johnson, 372 Pa. 266; 93 A.2d 619 (1953), *cert. denied* 345 U.S. 959 (1954) 19

Fuller v. United States, 407 F.2d 1199 (D.C. Cir. 1968), *cert. denied* 397 U.S. 1001 (1969) 19

Haynes v. Washington, 373 U.S. 503 (1962) 18

Leyra v. Denno, 347 U.S. 566 (1954) 18
Lyon v. United States, 513 F.2d 186 (5th Cir. 1969) 15

Mancusi v. Stubbs, 408 U.S. 204 (1972) 14

People v. Boone, 22 N.Y.2d 476; 239 N.E.2d 885; 293 N.Y.S.2d 287, *cert. denied* 393 U.S. 991 (1968) 19
People v. Lombardi, 25 A.D.2d 718, *remittitur amended* 25 A.D.2d 824 (1st Dept. 1966) 4, 5
People v. Lombardi, 20 N.Y.2d 266; 299 N.E.2d 206; 282 N.Y.S.2d 513 (1967) 5, 14
People v. Lombardi, 39 A.D.2d 700; 332 N.Y.S.2d 749 (1st Dept. 1972) 2, 11, 21
People v. Lombardi, 33 N.Y.2d 658; 303 N.E.2d 705; 348 N.Y.S.2d 749 (1973) 2, 11, 21
People v. McQueen, 18 N.Y.2d 337; 221 N.E.2d 550; 274 N.Y.S.2d 886 (1968) 19
People v. Pereira, 26 N.Y.2d 265; 258 N.E.2d 194; 309 N.Y.S.2d 901 (1970) 19
Peterson v. United States, 344 F.2d 419 (5th Cir. 1965) 15
Pointer v. Texas, 380 U.S. 400 (1965) 14

Spano v. New York, 360 U.S. 315 (1965) 18

PAGE

Thessen v. State, 454 P.2d 341 (Alaska 1969), *cert. denied* 396 U.S. 1029 (1970) 19

United States v. Maroney, 275 F. Supp. 435 (W.D. Penn. 1967) 19
United States ex rel. Caminito v. Murphy, 222 F.2d 698 (2d Cir. 1965), *cert. denied* 350 U.S. 896 (1966) 19
United States ex rel. Everett v. Murphy, 329 F.2d 68 (2d Cir. 1964), *cert. denied* 377 U.S. 967 (1969) 19

Statutes and Constitutional Provisions:

Constitution of the United States:
Amendment VI 11, 15, 16
Amendment XIV 11, 15
Former New York Penal Law §242 2
New York Code of Criminal Procedure §8(3)(d) 10, 12, 14
New York Criminal Procedure Law §670.10 ..... 10, 12
28 U.S.C. §1257(3) 2

Other Authorities:

5 Wigmore, Evidence §1237 (3d ed. 1940) 15

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement

C. James Lombardi, Jr., seeks certiorari to review a judgment of the Court of Appeals of the State of New York, rendered October 11, 1973, which unanimously affirmed a judgment of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, rendered May 25, 1972, which affirmed a judgment of the Supreme

Court of the State of New York, New York County, rendered March 10, 1971, convicting him, after a trial by jury, of two counts of ASSAULT IN THE SECOND DEGREE and one count of ATTEMPTED ASSAULT (former N.Y. Penal Law §242). Lombardi was sentenced to periods of imprisonment of from two to five years on each of the assault convictions, and from one to two years on the attempted assault, the sentences to run consecutively.

The Opinions Below

The New York Court of Appeals affirmed the petitioner's conviction without opinion, in a decision reported at 33 N.Y.2d 658, 303 N.E.2d 705, 348 N.Y.S.2d 980 (1973). The opinion of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, appears at 39 A.D. 2d 700, 332 N.Y.S. 2d 749 (1972). The Supreme Court of the State of New York, New York County, convicted petitioner without opinion, and that judgment is not reported.

Jurisdiction

The petition for certiorari was filed on about February 14, 1974, pursuant to an order of Mr. Justice MARSHALL, dated January 3, 1974, which extended the time for filing the petition until February 15, 1974. The petitioner invokes this Court's jurisdiction on certiorari pursuant to 28 U.S.C. §1257(3).

Questions Presented

1. Was the petitioner deprived of his right to confront Kristin Diaz when the testimony of this witness at petitioner's first trial was read to the jury at his retrial, because Ms. Diaz was too ill to testify?
2. Did five minutes of police questioning about an unrelated crime coerce petitioner into confessing?
3. Does a minor error in the course of a state judge's charge to the jury, which was corrected in the bulk of the charge and which was therefore harmless, provide sufficient basis for this Court's exercise of certiorari jurisdiction?

Statement of the Case

The Crimes and the First Trial

From the fall of 1963 through the summer of 1964, the petitioner, C. James Lombardi, Jr., a pharmacist and travel agent on Manhattan's East Side, lured three young women into his employ and, by a cunning ruse, induced them into swallowing a potent combination of barbiturates. Naively believing that these capsules were a new product which hardened the fingernails, each young woman was soon in a drug-induced state of virtual paralysis. The defendant then drove his hapless passengers to a Queens motel. Two women were sexually abused by Lombardi throughout the night; a third later testified that she had no memory of what transpired after she became unconscious due to the pills.

Pursuant to complaints by Lombardi's victims, an investigation was launched by the police, during the course of which Lombardi, using the same tactic, gave a young undercover policewoman a capsule containing the stupefying "nail hardener." He was then arrested. Immediately after being taken into custody, Lombardi confessed to his craven designs.

Lombardi was subsequently indicted for three counts of kidnapping, eight counts of assault, and one count of rape. Before trial, he moved to suppress his confession and other evidence on the grounds that he was arrested without probable cause, and had not been informed of the reason for his arrest or of his right to counsel. A pretrial hearing before the Supreme Court, New York County, disproved these allegations and the evidence was found to be admissible.

On April 13, 1965, after a trial by jury, Lombardi was found guilty of assaulting Dolores Moody, kidnapping and assaulting Ilse Harder, kidnapping, assaulting, and attempting to rape Kristin Diaz, and attempting to assault Policewoman Blanche Gibbons.

The Initial Appeals from Judgment

On appeal to the Supreme Court of the State of New York, Appellate Division, First Judicial Department, Lombardi argued that the verdict was not supported by the evidence, that the motions to suppress were improperly denied, and that the prosecutor's conduct was improper under applicable state law. The Appellate Division affirmed the judgment, without opinion. *People* v. *Lombardi*, 25 A.D.

2d 718, *remittitur amended* 25 A.D. 2d 824 (1st Dept. 1966). However, this decision was subsequently reversed by the New York Court of Appeals, which dismissed the kidnapping charges, holding that although the evidence proved the crime of kidnapping under a technical reading of the applicable state statute, that statute was not intended to cover situations where, as here, the asportation was only incidental to the commission of another crime. The court also ordered a new trial on the other charges of attempted rape, assault, and attempted assault. *People* v. *Lombardi*, 20 N.Y. 2d 266; 229 N.E. 2d 206; 282 N.Y.S. 2d 513 (1967).

The Instant Retrial

Prior to appellant's retrial, the prosecutor informed the court that one of Lombardi's victims, Kristin Diaz, was under a psychiatric infirmity that would prevent her from testifying. Accordingly, the People moved to have her sworn testimony from the first trial read to the jury. A hearing was held on the matter in the Supreme Court of the State of New York, New York County. At this hearing, Ms. Diaz's personal psychiatrist, Dr. Richard Robertiello, testified that this young woman suffered from a "masochistic character disorder." In June of 1970, Dr. Robertiello was contacted by an assistant district attorney about the possibility of Ms. Diaz testifying at Lombardi's second trial. The psychiatrist had been treating Ms. Diaz for about three years at this time. When he broached the subject with Ms. Diaz:

> "She got enormously upset. She had been doing quite well for several months and avoiding any kind of disastrous situations in her personal life and when

this came up into the picture she got tremendously upset and got anxious, depressed, and was just not herself." (H 90)*

A few months later, after the assistant district attorney had spoken to Ms. Diaz about the new trial, she came to Dr. Robertiello in an "enormously distraught" condition. Ms. Diaz told her doctor that the possibility of testifying had caused her to nearly burn down her apartment, physically assault her husband, and attempt suicide (H 92-93). After examining her, Dr. Robertiello advised her "not to testify under any circumstances, because I thought it would really be a danger not only to her mental health but perhaps even to her life" (H 94-95).

At the hearing itself, Dr. Robertiello repeated his diagnosis of the severity of Ms. Diaz's condition, stating that forcing her to testify might provoke suicide. He also opined that Ms. Diaz would be unable to rationally testify, even with the aid of tranquilizers. Dr. Robertiello had practiced psychiatry for twenty years, and had written four books and thirty articles on the subject (H 95-96, 116).

Ms. Diaz's husband, Lawrence Campbell, also testified at the hearing. Mr. Campbell had known Ms. Diaz for three years and had been married to her for two. Since he had known her, she had been under Dr. Robertiello's care. Although his wife was normally a rational, intelligent individual, when he tried to talk to her about the prior trial she became "a totally different person" and was "emotionally destroyed." Within the six months prior to the hearing,

* Numbered references preceded by the letter "H" are to the pretrial hearing.

when the possibility of her testifying became apparent, Ms. Diaz "lost all judgment," "broke out in rashes," and physically attacked Mr. Campbell. She also stated that she would quit her job and leave the country in order to avoid testifying at another trial (H 68-77).

After hearing the testimony of Ms. Diaz's husband and her psychiatrist, the court granted the motion to perpetuate the witness's testimony, and Lombardi proceeded to trial.

At the retrial, each of Lombardi's victims testified that Lombardi had tricked them into taking barbiturate capsules for the purpose of rendering them semi-conscious and vulnerable to his bizarre sexual advances.* Dolores Moody testified that she had first met Lombardi during late October or early November of 1963, when this attractive 22-year-old young woman went to his pharmacy to buy cigarettes (197, 263).** Ms. Moody accepted Lombardi's offer of a job in his travel agency, which was located in the front of the store (197, 210).

Soon after she began work, Lombardi asked her to go with him to a job-related cocktail party on Long Island, and gave her a bottle of "Nail-Tone" pills to take, indicating that this was a new product and she would soon be meeting the manufacturers (216-20). Ms. Moody swallowed the pills, and got into Lombardi's car. Soon afterwards, she began feeling dizzy and "blacked out" just after noticing the cars on a bridge to Queens (222-25). Her next recollection was that of waking up in her apartment, in the dark,

* A complete summary of the extremely lengthy trial testimony is contained in pp. 8-54 of respondent's brief in the New York Court of Appeals, one copy of which is appended to the instant brief.

** Numbered references are to the minutes of trial.

fully clothed. She then went to sleep (226-31). The following day, after going to a hospital because of her still-unsteady condition, Ms. Moody noticed that her bra had been turned inside out. This was the same undergarment she had worn on the following day, when she had put it on properly. Realizing that she had been sexually attacked, Ms. Moody went to the police and reported the incident (231-36, 291-95).

A few months later, in February of 1964, petitioner used the same tactic on Ilse Harder, a 21-year-old model, who had also stopped in the drug store to buy cigarettes (657-61). After being hired by Lombardi, she also was offered the pills before a Long Island cocktail party. On route to this alleged party, she became dizzy and found that her sight, speech, and balance were impaired (677-81). In a state of physical collapse and intermittent unconsciousness, she was taken to a motel, where Lombardi undressed her and sexually assaulted her (679-85). She also reported the incident to the police (687-91).

Lombardi's next victim was Kristin Diaz, a 25-year-old college graduate with a master's degree from Cornell University. Pursuant to the People's motion, Ms. Diaz's testimony at the first trial was read at the retrial. She stated that she had met the defendant on June 11, 1964, and had accepted the travel agency job. She too took the pills, lost control of herself on the way to Long Island, and ultimately found herself in a motel bed in Queens, where Lombardi removed her clothing and abused her sexually throughout the night (338-9, 632-33).

Lombardi was arrested on July 1, 1964, after undercover Policewoman Blanche Gibbons entered his pharmacy and was offered the travel agency job. When Lombardi gave her the nail hardening pills, and mentioned a trip to LaGuardia airport, Ms. Gibbons ran out of the store and Lombardi was arrested (796-807). Subsequent laboratory analysis revealed the "nail hardener" to be a high dosage of an extremely potent combination of barbiturates, easily capable of rendering a woman incapable of controlling herself (1998-99).

The testimony of these witnesses was supplemented and supported by that of a great number of roommates, neighbors, friends, motel operators, and hospital and police personnel who were involved in the aftermath and investigation of each separate sexual attack. This testimony is much too voluminous to summarize here, and accordingly this Court is referred to the summary contained in respondent's brief in the New York Court of Appeals for further details. However, it should be noted that after his arrest the petitioner confessed to many of his actions, basically admitting his strategy of giving drugs to his victims for the purpose of having sexual intercourse with them (803-05, 1167-7, 1314-20, 1417-30, 1118).

As to the defense, C. James Lombardi testified in his own behalf, and denied that he had ever given barbiturate capsules to, assaulted, or attempted to assault Dolores Moody, Ilse Harder, Kristin Diaz, or Policewoman Blanche Gibbons. The jury rejected his testimony and convicted him of assault in the second degree on Kristin Diaz and Ilse Harder and attempted assault in the second degree on

Policewoman Gibbons. Lombardi was acquitted of the attempted rape of Kristin Diaz, and the jury could not agree concerning the charge that he had assaulted Dolores Moody. Lombardi was sentenced to two to five years' imprisonment on each of the assault convictions, and one to two years' imprisonment on the attempted assault, the sentences to run concurrently.

The Appeals After the Retrial

Lombardi appealed his conviction to the Supreme Court of the State of New York, Appellate Division, First Department, arguing, *inter alia*, that the reading of the former trial testimony of Kristin Diaz at his retrial unconstitutionally abridged his right to cross-examine this witness, and that the judge's charge to the jury was prejudicial. The Appellate Division affirmed the conviction, by a divided court. The majority (STEVENS, P.J.; MCNALLY and CAPOZZOLI, JJ.) held that under applicable New York law, Ms. Diaz's prior testimony could be used at the retrial if the witness was "unable to attend by reason of his death, insanity, sickness or infirmity" [New York Code of Criminal Procedure §8(3)(d)],* and "it cannot be said on this record that under no reasonable circumstances could the court possibly have been satisfied [that] had Kristin Diaz been required to appear and testify in person her mental and physical health would have been seriously jeopardized." The court also held that although a small portion of the judge's charge to the jury, taken out of context, was technically erroneous, the charge taken as a whole "fairly stated the law applicable to this case." The dissenters

* Now New York Criminal Procedure Law §670.10.

(NUNEZ and MURPHY, JJ.) disagreed, opining that the sickness or infirmity of Ms. Diaz was not satisfactorily shown, and that the errors in the judge's charge warranted reversal. *People* v. *Lombardi,* 39 A.D. 2d 700; 332 N.Y.S. 2d 749 (1st Dept. 1972).

The petitioner was granted leave to appeal to the New York Court of Appeals, where he repeated his arguments. That Court unanimously affirmed the judgment of the Appellate Division without opinion. *People* v. *Lombardi,* 33 N.Y. 2d 638; 348 N.E. 2d 705; 348 N.Y.S. 2d 980 (1973).

Other Appeals

During the last ten years, the petitioner has also filed numerous collateral attacks on his conviction in nearly all New York State and federal courts. Although these proceedings are far too numerous and assorted to catalogue here, this Court should take judicial notice of its own files on petitioner for an indication of their scope.

The Instant Petition

In his petition for certiorari, Lombardi advances four grounds for this Court's review. First, he argues that the use at his retrial of Ms. Diaz's earlier testimony, taken at a trial where he was also charged with kidnapping, unconstitutionally deprived him of the right to confront this witness. Next, he argues that the police unconstitutionally coerced him into confessing his crimes. Further, he argues that the judge's charge contained error of such dimensions as to warrant this Court's review. Lastly, he "adopts the dissenting opinion of the Appellate Division" as another ground for granting the petition.

ARGUMENT

POINT I

Petitioner was not deprived of his right to confront Kristin Diaz when the testimony of this witness at petitioner's first trial was read to the jury at his retrial, because she was too ill to testify [answering the petition, Point I, pp. 7-8].

Prior to petitioner's second trial, a hearing was held to determine if testimony at the first trial could be read to the jury. The People contended that Miss Diaz was under an infirmity that prevented her from testifying, and that therefore her prior testimony could be read to the jury pursuant to the then-existing New York Code of Criminal Procedure, Section 8(3) (d)*:

> "Where the defendant has previously been tried upon an indictment or information embracing the same charge, the testimony of any witness who has testified upon such prior trial may be read in evidence by either party upon any subsequent trial of the same indictment or information, upon its being satisfactorily shown to the court that the witness is unable to attend by reason of his death, insanity, sickness, or infirmity, or that the witness cannot with due diligence be found in the state."

A hearing was held on the People's motion to perpetuate Ms. Diaz's testimony, and her husband, Lawrence Campbell, and her personal psychiatrist, Dr. Richard Robertiello, were called as witnesses. The testimony of these wit-

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* Now N.Y. Criminal Procedure Law §670.10.

nesses revealed that Ms. Diaz had developed a "masochistic character disorder" which would entail a substantial risk of suicide if she was forced to testify.* Apparently at this time Ms. Diaz under normal circumstances was a rational individual, who was teaching steadily at a local university. However, when the possibility of again testifying at trial and revealing the repulsive events of June 16, 1964, was presented to her, she became mentally unable to cope. As Dr. Robertiello testified:

> "It brought back a whole bunch of feelings of shame, humiliation, anger that were just too much for her, and she handled those kinds of feelings by being self-destructive" (H 94).

Dr. Robertiello also stated that in his opinion, forcing Ms. Diaz to testify could lead to her attempting suicide, and that even if she took the witness stand, she would become so hysterical that "you would have to carry her out" and she would be unable to rationally testify even with the aid of tranquilizers (H 92-96). This medical opinion was supported by the testimony of Ms. Diaz's husband, Lawrence Campbell, who stated that possibility of testifying again caused Ms. Diaz to attack him physically, break out in a skin rash, and undergo periods of hysteria. She also threatened to quit her job and leave the country rather than testify. She had never acted in such a manner before (H 68-77).

After hearing this evidence, the trial court granted the People's motion to perpetuate Ms. Diaz's testimony, which was accordingly read to the jury at petitioner's second trial. Defense counsel was offered an opportunity to sim-

* A fuller summary of the testimony at this hearing is contained at pp. 5-7, *supra*.

ilarly read either Ms. Diaz's entire lengthy cross-examination or any portion thereof which he deemed relevant. Counsel, however, declined to do so.

In the instant petition, Lombardi argues that the reading of Ms. Diaz's testimony deprived him of his right to confront this witness, as guaranteed by the Sixth and Fourteenth Amendments to the Federal Constitution. Lombardi does not attack the constitutional validity of New York CCP §8(3)(d) on its face. Neither does he contend that the testimony of an unavailable witness at a former trial cannot constitutionally be used at a subsequent proceeding, for this Court's decisions have made it clear that such use is proper under appropriate circumstances. *California* v. *Green,* 399 U.S. 149 (1970); *Mancusi* v. *Stubbs,* 408 U.S. 204 (1972); *see also Pointer* v. *Texas,* 380 U.S. 400 (1965); *Barber* v. *Page,* 390 U.S. 719 (1968). However, he argues that the application of the statute to the instant facts was unconstitutional, because the testimony in question was taken at a trial where the crimes at issue were different. At his first trial, petitioner was charged with kidnapping, assault, attempted assault, and rape, and was convicted of kidnapping, assault, attempted assault, and attempted rape. The kidnapping charge was then dismissed by the New York Court of Appeals, which held that although Lombardi's actions could technically be viewed as kidnapping, the applicable state statute had not been intended to cover situations where the asportation was merely incidental to the commission of another crime. *People* v. *Lombardi,* 20 N.Y. 2d 266, 229 N.E. 2d 206, 282 N.Y.S. 2d 513 (1967). Thus, when Lombardi was retried, he was charged with assault, attempted assault, and attempted rape. The jury

convicted him of the assault and the attempted assault, and acquitted him of the attempted rape.

Petitioner's argument, which has been rejected on its merits in two New York appellate courts, does not present a constitutional issue of sufficient novelty and magnitude to warrant this Court's exercise of certiorari jurisdiction. It is settled law that the perpetuation of former testimony at a subsequent proceeding requires that "the *issue* on the occasion when the former testimony or deposition was given must have been substantially the same, for otherwise it cannot be supposed that the former statement was sufficiently tested by cross-examination upon the point now in issue. Conversely, it is sufficient if the issue was the same, or substantially so for the purpose." 5 Wigmore, Evidence, §1387 (3d ed. 1940). Indeed, the very words of the instant New York statute, which is limited in its application to subsequent trials of "the same indictment or information" represents a recognition of this principle. *See Lyon* v. *United States,* 513 F.2d 186 (5th Cir. 1969) (testimony of an unavailable witness at a former trial may be read at a retrial where the indictment, although containing some "new matter," presented substantially the same issues). And, in *Peterson* v. *United States,* 344 F. 2d 419, 423-24 (5th Cir. 1965), the United States Court of Appeals ruled that it was impermissible to admit into evidence at a second trial testimony from a former trial, where a totally new charge had been added at the second trial.

However, the instant case presented a situation which is the reverse of that in *Peterson.* C. James Lombardi, at his second trial, faced the same charges of assault and attempted assault which were at issue at his prior trial.

He also faced a charge of attempted rape, the same crime the jury had convicted him of at the first trial, where he had been charged with a completed rape. Thus, the only difference was that the defendant was not charged with the additional crime of kidnapping. Accordingly, counsel at the first trial had every opportunity to cross-examine Ms. Diaz about all of the charges which petitioner was facing at his retrial when her testimony was read to the jury, and the issues at the two proceedings were thus "substantially the same" for Sixth Amendment purposes.

Moreover, a review of Ms. Diaz's cross-examination at the first trial refutes petitioner's implied claim that it was oriented exclusively towards the kidnapping charge. At this proceeding, petitioner's counsel simply chose to generally attack Ms. Diaz's credibility in order to discredit her entire story. In fact, in the first one hundred pages of cross-examination, he did not even delve into that portion of her story which dealt with her taking the "nail hardener" capsule and the subsequent trip to the motel. Instead, he questioned Ms. Diaz about the various places where she had lived, her allergies, and her job resumé. He also tried to show that the night of June 16 was not, as Ms. Diaz claimed, the first night she had worked for the defendant. And, when he questioned her about the incidents of the night of the 16th, counsel merely attempted to generally discredit her story. Thus, his entire cross-examination would have been just as relevant at the retrial as it was at the first trial.

It should also be noted that even if counsel had questioned Ms. Diaz specifically about her transportation to a Queens motel room, where the sexual assault took place,

this testimony would also have been relevant at the retrial, for it established the necessary background for the charged crimes of assault and attempted rape. Thus, the mere fact that this testimony was not now technically sufficient, under applicable state law, to make out the additional crime of kidnapping would not in any way render any question aimed at discrediting this portion of the witness's story irrelevant at the second trial.

POINT II

Petitioner's confession was not coerced by a few police questions about an unrelated crime [answering the petition, Point II, pp. 8-9].

Petitioner was arrested on July 10, 1964. Although his crime had occurred in New York's 19th police precinct, the officers of which were investigating the affair, he was taken to the nearby 22nd police precinct station house, because at the time a large number of newsmen were present at the 19th precinct to cover another case. Lombardi and the arresting officers arrived at the 22nd precinct station house at about 4:00 p.m. In order to kill time until the proper police official—Lieutenant Ward of the 19th precinct—could arrive and question Lombardi about his actions, Detective Sgt. Robert Maas asked the petitioner a few questions about a Professor Gallagher and a Mr. Krebs, two men who were murdered shortly before Lombardi's arrest. This was also done as a matter of routine procedure, since these murders were then the topic of an intense investigation by the 19th precinct. These questions lasted about five minutes, and terminated when Lombardi stated that he would not be able to identify pictures of Krebs and

Gallagher. Detective Maas did not then persist in this inquiry, but instead began to take Lombardi's pedigree. Lieutenant Ward arrived at the precinct at 4:30, and told Lombardi that he did not have to tell the police anything, and that he should get a lawyer and tell the lawyer the truth. Lombardi thereupon "put his head down," stated that he wanted to "clear the air," and proceeded to give a detailed confession of his misdeeds. This confession came less than one hour after Lombardi was taken into custody (1155-7, 1309-56).

The petitioner, apparently incorporating the arguments contained in his brief in the New York Court of Appeals, seems to argue that his relief when Ward arrived and revealed that he was being arrested only for the kidnapping and rape of various young women caused him to make his subsequent confession. The petitioner therefore concludes that his confession was involuntary, because it was primarily a product of police deception. This argument has already been rejected by the trial court, which, after a pretrial hearing, found that the confession was voluntary. This finding was affirmed by two New York appellate courts.

Petitioner's contention is without merit. The use of fraud, artifice or deception will render a confession involuntary only when such practices are aimed directly at obtaining a confession and when, considered with the totality of all the other circumstances, it is apparent that the confessor's will was overborne. *Leyra* v. *Denno,* 347 U.S. 566 (1954); *Spano* v. *New York,* 360 U.S. 315 (1959); *Haynes* v. *Washington,* 373 U.S. 503 (1962); *Fuller* v.

United States, 407 F. 2d 1199 (D.C. Cir. 1968), *cert. denied* 397 U.S. 1001 (1969); *U.S. ex rel. Everett* v. *Murphy*, 329 F. 2d 68 (2nd Cir. 1964), *cert. denied* 377 U.S. 967 (1969); *United States ex rel. Caminito* v. *Murphy*, 222 F. 2d 698 (2d Cir. 1965), *cert. denied* 350 U.S. 896 (1966). However, the mere presence of some degree of misrepresentation, even if it is deliberately aimed at eliciting a confession, is not sufficient by itself to lead to the conclusion that the confession is involuntary. *Commonwealth* v. *Johnson*, 372 Pa. 266, 93 A. 2d 691 (1953), *cert. denied* 345 U.S. 959 (1954); *Thessen* v. *State*, 454 P. 2d 341 (Alaska 1969), *cert. denied* 396 U.S. 1029 (1970); *United States* v. *Maroney*, 275 F. Supp. 435 (W.D. Penn. 1967). New York also recognizes the principle that the mere showing of deception is not sufficient to prove involuntariness. *People* v. *McQueen*, 18 N.Y. 2d 337, 221 N.E. 2d 550, 274 N.Y.S. 2d 886 (1966); *People* v. *Boone*, 22 N.Y. 2d 476, 239 N.E. 2d 885, 293 N.Y.S. 2d 287, *cert. denied* 393 U.S. 991 (1968); *People* v. *Pereira*, 26 N.Y. 2d 265, 258 N.E. 2d 194, 309 N.Y.S. 2d 901 (1970).

Thus, the key question is whether the deception involved, together with all other circumstances, could have overborne the will of the defendant and induced him to confess. In the instant case, it is patent that this could not have occurred. First, the questions about Krebs and Gallagher were very brief, lasting only about five minutes, and this line of questions terminated immediately when Lombardi indicated that he would not be able to identify pictures of the murder victims. Moreover, these questions were not aimed at inducing Lombardi to confess to his crimes, but were at the most a time-wasting attempt to buy the questioners a few minutes, until a senior police official could be brought to the scene. Additionally, it was then a normal

police procedure to ask neighborhood figures about these murders, which were at this time the subject of an intensive police investigation in the 19th precinct, so the police had at least a rational basis in attempting this "shot in the dark."

Lastly, it should be remembered that C. James Lombardi was an intelligent professional pharmacist and former football player who claimed to mingle in "high society." Before his confession, he was told of the reason for his arrest, that he could keep silent, and that he should obtain a lawyer. Thus, it is hard to believe that five minutes of questioning about an unrelated crime could possibly have coerced him into confessing anything, particularly in view of the fact that less than one hour elapsed from the time of Lombardi's arrest to the time of his confession. In short, Lombardi's prompt confession was clearly shown to be voluntary, and, as such, was properly admitted into evidence against him.

POINT III

No substantial federal issue is presented by petitioner's claim of error in the judge's charge to the jury [answering the petition, Points III and IV, pp. 9-10].

Petitioner claims that the trial judge improperly told the jury that it should acquit only if an element of certain crimes was missing beyond a reasonable doubt. This is a reference to a single portion of the charge, taken out of context. However, the Appellate Division of the Supreme Court of the State of New York specifically reviewed the propriety of this language and of the entire charge and,

although finding some minor error, concluded that "the charge must be read as a whole, and the context in which the quoted portion appears much be evaluated against the total charge. So considered, we find that the error did not prejudice the rights of the defendant. The charge, taken as a whole, fairly stated the law applicable to the case." *People* v. *Lombardi*, 39 A.D. 2d 700, 701, 332 N.Y.S. 2d 749 (1st Dept. 1972). The New York Court of Appeals affirmed this conclusion. *People* v. *Lombardi*, 33 N.Y. 2d 658, 303 N.E.2d 705, 348 N.Y.S.2d 980 (1973). Accordingly, the existence of a single minor error in the language of a lengthy charge to the jury by a state judge, which is harmless in the total context of that charge, certainly does not provide an adequate basis for this Court's exercise of certiorari jurisdiction.

In any event, it is clear from a review of the judge's charge that the court was well aware of the People's burden of proof in criminal cases:

> "The defendant has entered a plea of not guilty, and thus put into issue each and every allegation of the indictment. And it is incumbent upon the People to prove each and every element of the crimes submitted beyond a reasonable doubt" (2341-42).

Other similar language abounds in other portions of the charge (2344, 2352-53, 2354). Indeed, in one instance the court specifically told the jury that "The People, having accused the defendant of the crimes charged in the indictment, have the burden of proving such accusations, and the defendant is under no obligation to disprove them. This burden never shifts from the People to the defendant (2364-65). Thus, the New York appellate courts had an adequate basis for finding that the charge was substantially a proper

one. For a fuller discussion of this issue, this Court is again referred to respondent's brief in the New York Court of Appeals.

Petitioner also attempts to "adopt the dissenting opinion of the Appellate Division, First Department" as an additional ground for granting the petition (Petition, Point III). Inasmuch as this dissent was concerned only with the reading of Ms. Diaz's testimony to the jury, an issue dealt with in Point I, *supra,* and with the dissenter's discretionary reading of the charge as error, it is obvious that no additional federal issue is prevented by this dissent, which was in any event overruled by both the majority of the Appellate Division and the New York Court of Appeals.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

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